87-1769

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October, 1987 Term

GEORGIA ANDREWS, et al.,

Plaintiffs/Petitioners,

vs.

VETERANS ADMINISTRATION, of the UNITED STATES OF AMERICA,

Defendant/Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Gross Negligence Constitutes Intentional or Willful Conduct Under 5 U.S.C. §522a(g)(1)(d)(4).

II. Whether the Failure of a Government Agency to Follow Clear Legislative and Judicial Mandate Constitutes Conduct Warranting Damages Under 5 U.S.C. §522a(g)(1)(d)(4).

PETITION FOR WRIT OF CERTIORARI

LIST OF PARTIES:

GEORGIA ANDREWS, ERIN BRETT, FRANCES E. CASSLE, B. J. DURHAN, MAUREEN ENGERT, MARY FOX, MAXINE GRIFFIN, BETTY GRUBB, RUTH HOLMES, LUCILLE HOPPE, DOROTHY HOMYAK, SHARON K. KAISER, CHANDRA K. LILLEMOEN, CAROLYN O'BRIEN, MARY JANE PRYSOCK, LAURA RUSSELL, LAURA SCHERR, JOAN SCHICK, BRENDA SCHULZ, VICTORIA SMITH, KATHRYAN TOULOUSE, MARGARET WICKHAM, NORMAN WILDE, and all others similarly situated,

Plaintiffs/Petitioners,

VETERANS ADMINISTRATION, of the UNITED STATES OF AMERICA,

Defendant/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

OPINIONS BELOW

The Opinion of the United States District Court for the District of Wyoming, reproduced as Appendix A, is recorded at 613 F.Supp 1404. The Opinion of the United States Court of Appeals for the Tenth Circuit, reproduced as Appendix B, Case No. 85-2351, Slip Opinion (United States Court of Appeals, 10th Circuit, January 28, 1988) is presently unpublished.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 23, 1988. Jurisdiction to review the Judgment of the Court of Appeals by Writ of Certiorari exists under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Privacy Act of 1974, 5 U.S.C. §522a. The Privacy Act of 1974 is attached in its entirety as Appendix C.

§7114 of the Federal Service Labor-Management Relations Act, 5 U.S.C. §7101 through 7135. §7114 is attached in its entirety as Appendix D.

The Freedom of Information Act, 5 U.S.C. §552. The Freedom of Information Act is attached in its entirety as Appendix E.

STATEMENT OF THE CASE

On June 4, 1984, Patricia Sanchez, President of Local 1014, American Federation of Government Employees (AFGE), the exclusive agent for nurses at the VA Medical Center in Cheyenne, Wyoming, including Petitioners, requested in writing that the Medical Center release the Proficiency Reports of all registered nurses employed at the Center for the three (3) years prior to June 4, 1984.

The Proficiency Reports contained two (2) pages; the first being a collection of numerical ratings of the individual nurses intergrity, emotional stability, dependability, interpersonal relations and twenty other related areas and the second being a narrative discussion of the nurses' performance during their tenure at the Center and areas of strength, weakness and prospects for advancement. The District Court correctly observed:

> It is beyond doubt that the information in the Proficiency Reports [was] sensitive in nature, and the release of this information, if identifying information were not adequately deleted, would result in embarrassment of the persons to which [sic] they pertain.

Andrews v. Veterans Administration of United States, 613 F.Supp. 1404, 1407 (D.Wyo. 1985) (The decision of the District Court is hereinafter cited in full.)

Ms. Hazel Gilligan, the Chief of Personnel Services at the Center and the custodian of personnel files, received Ms. Sanchez' request. Because Ms. Gilligan had never before received a request for all personnel files, because she had never received a request for a personnel file without the consent of the person to whom it pertained and because Ms. Sanchez specified no reason for her request, Ms. Gilligan consulted the

Personnel Manual, then wrote Ms. Sanchez seeking a basis for her inquiry.

Ms. Sanchez responded that the files were to be used in a possible grievance and in preparation for a labor/management meeting to be held later in June. Ms. Sanchez, in fact, neither intended to use the files in a possible grievance nor in an upcoming labor/management meeting but was, rather, on a general fishing expedition which may have been motivated by spite or anger resulting from her own failure to obtain a requested promotion.

Still concerned with the vague grounds on which Ms. Sanchez based her request, Ms. Gilligan contacted the Labor Relations Department of the Veterans Administration in Washington, D.C. for further guidance. The Department advised Ms. Gilligan that 5 U.S.C. §7114(b) mandated disclosure of the personnel reports to Ms. Sanchez because of her position as a union official and added that, after the reports had been sanitized to remove identifiable information, she had no choice but to

release the requested personnel files. The Washington personnel of the Respondents neither trained Ms. Gilligan in sanitizing personnel records nor assisted or guided Ms. Gilligan in her attempt to sanitize the personnel records included in Ms. Sanchez' request.

Prior to the release of the Proficiency Reports, Petitioners and other nurses employed at the Medical Center wrote to Ms. Gilligan objecting to their release. On June 20, 1984, Ms. Gilligan released the Proficiency Reports to Ms. Sanchez and, by letter same dated, responded to the Petitioners and other nurses' objections by stating that she was required to release the Proficiency Reports by 5 U.S.C. §7114. Attached to this letter was the Proficiency Report of Laura Scherr in its supposedly sanitized condition. Notwithstanding the Report's "sanitized" condition, several of Ms. Scherr's co-workers were able to identify her as the subject of the Report. The Proficiency Reports of each of the

Petitioners likewise revealed the identify of the person covered by the Report.

The Labors Relation Department of the Veterans Administration neither trained Ms. Gilligan regarding the release of information covered by the Privacy Act nor instructed her that it was necessary for her to balance the interest represented by Ms. Sanchez' request against the interest represented by the Petitioners' objections thereto in determining whether to release the Proficiency Reports. To the contrary, the Department expressly instructed Ms. Gilligan that she had no choice but to release the Reports in a sanitized condition. The District Court described the effect of the Department's instructions:

> She [Ms. Gilligan] felt that she could not second guess the union in determining whether release to aid an impending or proposed grievance proceeding would be proper. She viewed her obligation under the Privacy

Act as being limited to assuring that the materials were fully sanitized before the release in a context where the union has requested access to them. She did not attempt to balance the privacy interests of the subjects of the Reports against the competing interest of the union in obtaining the records, which interests were ambiguous and virtually undefined, and she never concluded that the union's interests were adequate to override the privacy interest of [Petitioners]. She felt that whenever the union asked for information in the personnel files of employees it represents, when it is acting in a representative capacity, it should be given the records in a sanitized form. She determined that the union was entitled to receive the information without having an adequate factual basis to determine whether the request was

> legitimate, or was necessary to the union's attempt to represent the nurses at the Medical Center.

Andrews v. Veterans Administration of United States, 613 F.Supp. 1404, 1409-1410 (D.Wyo. 1985)

The District Court determined that the Labor Relations Department was grossly negligent in advising Ms. Gilligan that she was completely without discretion as to whether to release the Proficiency Reports, in failing to advise her that it was necessary to weigh the competing prodisclosure and antidisclosure interest in determining whether to release such Reports, in failing to adequately train Ms. Gilligan regarding the release of information covered by the Privacy Act and in failing to provide her adequate assistance regarding Ms. Sanchez' request. *Andrews v. Veterans Administration of the United States*, 613 F.Supp. 1404, 1409, (D.Wyo. 1985).

The District Court then held that gross negligence constituted intentional or willful conduct

under 5 U.S.C. §522a(g)(1)(d)(4). On July 17, 1985, the District Court entered its Judgment in favor of Petitioners in the minimum amount recoverable under 5 U.S.C. §522a(g)(4)(A) together with cost and reasonable attorney's fees pursuant to 5 U.S.C. §522a(g)(4)(B).

On appeal, the United States Court of Appeals for the Tenth Circuit held that the District Court erred as a matter of law when it equated gross negligence with a willful or intentional violation of the Privacy Act.

It then held that the Veterans Administration's Washington personnel were not grossly negligent in wrongfully instructing Ms. Gilligan that 5 U.S.C. §7114 compelled the release of the Proficiency Reports and in not instructing Ms. Gilligan to conduct the balancing test between the Union's interest in obtaining the Proficiency Reports and Petitioners' privacy interests to determine whether she should release such Reports.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals' decision, that "willful or intentional" conduct as used in the Privacy Act of 1974 is distinguishably more egregious than gross negligence, flies directly in the face of the legislative history of 5 U.S.C. §522a, the decision of the District of Columbia Circuit Court of Appeals in *Albright v. United States* , 732 F.2d 181 (D.C. Cir. 1984) and the decision of the Fifth Circuit Court of Appeals in *Chapman v. National Aeronautics and Space Administration*, 736 F.2d 238 (5th Cir. 1984), cert. denied 469 U.S. 1083 (1984).

To support its determination, the Court of Appeals points to the opinions in *Tijerina v. Walters*, 821 F.2d 789 (D.C. Cir. 1987); *Laningham v. United States Navy*, 813 F.2d 1236 (D.C. 1987); *Hill v. Department of Air Force*, 795 F.2d 1067 (D.C. Cir. 1986); *Moskiewicz v. United States Department of*

Agriculture, 791 F.2d 561 (7th Cir. 1986); *Doe v. General Services Administration*, 544 F.Supp. 530 (D.Md. 1982); and, *South v. FBI*, 508 F.Supp. 1104 (D.Ill. 1981). The majority of these decisions incorporate the definition of "gross negligence" as used in *Albright*, thus creating not only a conflict between the Tenth Circuit and the D.C. Circuit, but an internal conflict in the Tenth Circuit's opinion in the instant case.

The Court of Appeals then ignores the plain language of the Privacy Act, the Freedom of Information Act, the FSLRA and the judicial interpretation of these Acts and holds that the Veterans Administration had a reasonable basis for believing that it was acting lawfully when it disregarded their mandate.

I. THE DECISIONS OF THE D.C. CIRCUIT COURT OF APPEALS IN *ALBRIGHT V. UNITED STATES*, AND THE FIFTH CIRCUIT COURT OF APPEALS IN *CHAPMAN V. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION*

CONFLICT WITH THE TENTH CIRCUIT COURT OF APPEALS' OPINION IN THE INSTANT CASE

In *Albright v. United States, supra*, the Court stated:

> Section 552a(g)(4) imposes liability only when an agency acts in violation of the act in an intentional or willful manner, either by committing the act without grounds for believing it was lawful, or by flagrantly disregarding others' rights under the Act.

Supra at 189.

The Court then assigned a term of art to its description of intentional and willful conduct:

> Thus Congress stated, and the Courts have recognized, that an agency is liable for violations caused by its gross negligence.

Id. at Footnote 25 (citing *Parks, supra*).

Similarly, in *Chapman v. National Aeronautics and Space Administration,* the Court, in

determining whether the Appellant had demonstrated that the District Court had clearly erred by finding the agency had not willfully or intentionally violated the Privacy Act, held:

> We do not agree that this conduct, without more, necessarily implies that NASA acted with the willfullness or "gross negligence," that is a prerequisite to recover damages under the Privacy Act.

Id. at 243. (Citing *Edison v. Department of the Army*, 672 F.2d 840, 846 (11th Cir. 1982)).

The citations to *Edison* and *Parks* are significant for neither decision states directly that "willful or intentional" conduct are equivalent to gross negligence but rather rely upon the Analysis of House and Senate Compromise Amendments to the Federal Privacy Act which provides:

> On a continuum between negligence and the very high standard for willful,

> arbitrary or capricious conduct, willful or deliberate is viewed as somewhat greater than gross negligence.

120 Cong. Rec. S. 40405, 40406 (1974); 120 Cong. Rec. H. 40881, 40882 (1974).

Albright and *Chapman* stand for the proposition that the phrase "somewhat greater" in the analysis does not reflect a measurably lesser degree of care than gross negligence.

The opinions of the District of Columbia Circuit Court of Appeals in *Tijerina* and *Laningham*, while they retain the "somewhat greater than gross negligence" language from the analysis, incorporate *Albright's* definition of gross negligence when defining "willful or intentional" conduct. In *Tijerina*, the Court stated:

> In that case [*Albright*] we specifically recognized that the Act imposes liability where the agency "commit[s] the act without grounds for believing it to lawful [or]

> flagrantly disregard[s] others' rights under the act."

821 F.2d at 799. (Citing *Albright, supra*, at 189).

The Court in *Laningham* also incorporated Albright's definition of gross negligence when defining willful and intentional conduct:

> Therefore, to meet its burden, the Plaintiff must prove that the offending agency acted "without grounds for believing [its actions] lawful or that if [sic] "flagrantly disregarded" the rights guaranteed under the Privacy Act.

813 F.2d at 1242. (Citing *Albright, supra*, at 189).

"Gross negligence," as defined in *Albright* remains the standard in the District of Columbia Circuit for liability under the civil remedies provision of the Privacy Act. *Reuber v. U.S.*, 829 F.2d 139, 144 (D.C. Cir. 1987); *Dixon v. Office of Personnel Management*, 828 F.2d 32, 37 (D.C. Cir. 1987).

Not only does the Tenth Circuit Court of Appeal's decision in the instant case, that there is more than a merely semantic difference between "gross negligence" and "something more than gross negligence," create a conflict between the Tenth Circuit and the District of Columbia Circuit and the Fifth Circuit, it creates a conflict within the very body of the Court's opinion. There the Court states:

> We are persuaded by the District of Columbia Circuit's definitions of willful or intentional that contemplate action "so 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful'" or conduct committed "without grounds for believing it to be lawful" or action "flagrantly disregarding others' right under the act," *Albright*, 732 F.2d at 189, and we adopt those definitions, and add the view expressed in *Moskiewicz*, 791 F.2d at 564 (7th Cir. 1986), that the

> conduct must amount to, at very least, reckless behavior. Those, in similar definitions, describe conduct more extreme than gross negligence.

Andrews, et al. v. Veterans Administration, Case No. 85-2351, slip op., United States Court of Appeals Tenth Circuit, January 28, 1988. (Citations omitted). Thus, the Court in one breath rejects "gross negligence" as defined by the Court in *Albright* as the standard for civil liability under the Privacy Act and, in the next breath, adopts that very definition as the standard for liability under the Privacy Act in the Tenth Circuit. These conflicts leave the District Courts virtually without guidance when faced with cases brought under the civil remedies provision of the Privacy Act.

II. THE TENTH CIRCUIT'S ANALYSIS OF THE RELATIONSHIP BETWEEN THE PRIVACY ACT OF 1974, 5 U.S.C. §552a, THE FREEDOM OF INFORMATION ACT, 5 U.S.C. §552 AND THE FSLRA, 5 U.S.C. §7114, COMPLETELY EVISCERATES THE

PROTECTIONS OF THE PRIVACY ACT WHEN THE INTEREST OF INDIVIDUAL UNION MEMBERS ARE OPPOSED TO THE INTEREST OF UNION MANAGEMENT.

The Tenth Circuit held that the Washington personnel of Veteran Administration's order to Ms. Gilligan that the FSLRA required release of Petitioners' personnel file to Ms. Sanchez was not without grounds to believe it was lawful and did not flagrantly disregard Petitioners' rights under the Privacy Act. *Andrews, supra* at 17-18. It further held that, even though the Veterans Administration did not balance the interest in favor of disclosure against Petitioners' rights under the Privacy Act, it did not demonstrate flagrant disregard for Petitioners' rights under the Privacy Act because the Veterans Administration made some effort to protect Petitioners' privacy interest by attempting to sanitize their personnel files before releasing the same to Ms. Sanchez.

The Court jusitifies these two acts by ignoring the legislature's intent on how the Privacy Act, Freedom of Information Act and FSLRA should interact as reflected in the clear and unambiguous language of those statutes and by construing those statutes in such a way as to make it appear that, when faced with a request under the FSLRA, an agency is faced with so great a public interest that it may ignore the express language of these Acts as well as the established procedures for resolving the competing interest evidenced by such Acts.

Contrary to the Tenth Circuit's interpretation, while the interest represented by the Privacy Act, Freedom of Information Act and FSLRA do vary, the provision of those Acts do not conflict. The Privacy Act states:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person or to another agency, except pursuant to written request by, or with

> the prior written consent of, the individual to who the record pertains, unless disclosure would be-
>
> * * *
>
> (2) Required under §552 of this title [FOIA];

5 U.S.C. §552a(b)(2).

Clearly the provisions of the Privacy Act are subordinate to the provisions of the Freedom of Information Act. The FSLRA's position in this statutory hierarchy is revealed in 5 U.S.C. §7114 which provides:

> (b) The duty of an agency and exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation-
>
> * * *
>
> (iv) In the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request

> and, to the extent not prohibited by law, data-
>
> * * *
>
> (B) Which is reasonably available and necessary for full and proper discussion, understanding, negotiation of subjects within the scope of collective bargaining;

5 U.S.C. §7114(b)(4)(B). (Emphasis supplied).

Thus, if the rights reflected in the Privacy Act are subrogated to the mandates of the Freedom of Information Act, the union's rights under the FSLRA are subrogated to both.

The provisions of these statutes do not conflict, but, on the contrary, coexist harmoniously. There is nothing within these statutes to which the Veterans Administration can point, even now, which provide any reasonable basis for the Veterans Administration to believe that its order to Ms. Gilligan that the FSLRA mandated release of Petitioners' personnel files was in accordance with the law.

Not only did the Tenth Circuit hold that the Veterans Administration could disregard the clear legislative mandate set forth in the interlocking provision of the Acts, it held that Veterans Administration could ignore the universally recognized judicial mandate of those decisions interpretting exemption B(6) of the Freedom of Information Act. That exception provides:

> (b) This section does not apply to matters that are-
>
> * * *
>
> (vi) Personnel and medical files and similar files the disclosure of which would constitute a clearly and warranted invasion of personal privacy;
>
> * * *
>
> Any reasonably separable portion of a record shall be provided to any person requesting such record after deletion of the portions

> which are exempt under this subsection.

5 U.S.C. §552(b).

As the District Court stated:

> In determining whether a violation of personal privacy is clearly unwarranted, the agency, and the court, must balance the interest of the subject and personal privacy against the competing interest of the party requesting the information and having access to agency documents. Rose v. Department of Air Force, [495 F.2d 261 (2nd Cir. 1974), aff'd. 425 U.S. 352 (1976)]; *Campbell v. United States Civil Service Commission*, 539 F.2d 58 (10th Cir. 1976); *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir. 1979) cert. denied 444 U.S. 842; *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir. 1980).

* * *

> It is error for the agency to fail to engage in this sort of analysis before determining whether or not to release the information. *Disabled Officers Association v. Rumsfeld*, 428 F.Supp. 454 (D.D.C. 1977); *Sears, Robuck Co. v. General Services Administration*, 553 F.2d 1378 (D.C. Cir. 1977) cert. denied 434 U.S. 826; *People of the State of Illinois v. United States*, 668 F.2d 923 (7th Cir. 1981) cert. denied 455 U.S. 1000 (1982); *Judiciary Committee of General Assembly v. Freedom of Information Commission*, 473 A.2d 1248 (Conn. 1983).

Andrews v. Veterans Administration of the United States, 613 F.Supp. 1404, 1412 (D. Wyo. 1985). See also *Andrews, supra*, at Page 12, Footnote 8.

Notwithstanding its recognition that the Veterans Administration had a well-settled obligation to conduct this balancing test, the Tenth Circuit held that the Veterans Administration, in

failing to follow this established judicial mandate, did not act without grounds for believing its acts to be lawful. Rather, the Appellate Court held that the Veterans Administration had a reasonable basis to believe its actions to be lawful, because, by attempting to sanitize Petitioners' records, it demonstrated some concern for Petitioners' privacy interest. *Andrews, supra* at 18.

The Tenth Circuit's opinion, in effect, holds that a government agency is not liable for damages under the Privacy Act if it makes any attempt to acknowledge a subject's privacy interests. It states to government agencies that they need only acknowledge a subject's privacy interest then may ignore the clear provisions of the law without fear of retribution.

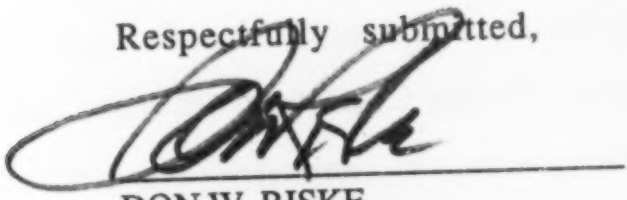
CONCLUSION

The standard for liability under the civil remedies provision of the Privacy Act established by the Tenth Circuit in the instant case directly conficts with the standards set forth by the District of Columbia Court of Appeals in *Albright, supra.* The Tenth Circuit's opinion abrogates the duty of government agencies to abide by clear legislative and judicial mandate, thereby stripping the millions of individuals protected by the Privacy Act of the rights and remedies which Congress intended to confer. For these reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

DATED this 25 day of April,

1988.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was placed in the United States mail, postage prepaid, this 25 day of April, 1988, addressed to:

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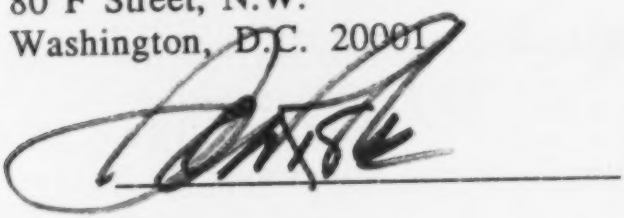

APPENDIX A

Andrews v. Veterans Administration of the United States
613 Federal Supplement 1404 (District Court, Wyoming, 1985)

Georgia Andrews; Erin Brett; Frances E. Cassle; B.J. Durham; Maureen Engert; Mary Fox; Maxine Griffin; Betty Grubb; Ruth Holmes; Lucille Hoppe; Dorothy Homyak; Sharon K. Kaiser; Chandra K. Lillemoen; Carolyn O'Brien; Deloris O'Brien; Mary Jane Prysock; Laura Russell; Laura Sherr; Joan Schick; Brenda Schulz; Victoria Smith; Kathryan Toulouse; Margaret Wickham; Norman Wilde; and all others similarly situated, Plaintiffs

v.

Veterans Administration of the United States of America and the Veterans Administration Medical Center of Cheyenne, Wyoming, Defendants.

No. C84-0459-B

United States District Court,
D. Wyoming.

July 17, 1985.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BRIMMER, District Judge.

This matter came on regularly for trial to the Court on June 13 and 14, 1985, the Honorable Clarence A. Brimmer, United States District Judge for the District of Wyoming presiding. Counsel

appearing were Donald W. Riske, Esq., and Warren R. Darrow, Esq., for plaintiffs, and Henry T. Jones, Esq., counsel for the Veterans Administration, and David A. Kern, Esq., Assistant United States Attorney, for defendant. The Court has reviewed the pleadings, considered the arguments of counsel, the views of Local 1014 of the American Federation of Government Employees set forth in its Amicus Curiae Brief, has reviewed the exhibits submitted, and considered the testimony presented at trial, and being fully advised in the premises makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Plaintiffs are registered nurses employed by defendant, Veteran's Administration, at its Medical Center located in Cheyenne, Wyoming. They bring this action under the Privacy Act of 1974, 5 U.S.C. § 552a(g), requesting injunctive relief and damages in the amount of $1,000.00 per plaintiff, alleging defendants released personnel records in an improperly sanitized condition so that the identity of plaintiffs could be determined from the information released. Plaintiffs contend such files contained sensitive information, including evaluations of job performance, the release of which constituted clearly unwarranted invasions of plaintiffs' personal privacy, that the release was not compelled under exemption six of the Freedom of Information Act, 5 U.S.C. § 552(b)(6), and that the release was in violation of plaintiffs' rights under the Privacy Act, 5 U.S.C. § 552a.

The dispute which culminated in this suit began on June 4, 1984, when Patricia Sanchez, President of Local 1014, American Federation of Government Employees, the exclusive bargaining agent for nurses at the Medical Center, including plaintiffs, made a written request for release to her of the proficiency reports of all of the registered nurses employed at the Center. Just after she made this request Mrs. Sanchez, on June 5, 1984, filed a grievance on her own behalf because she failed to receive a requested promotion in the C Ward at the Center. However, Mrs. Sanchez' request was not limited to reports relating to the successful candidates for promotions in the C Ward, or to the time in question, but rather related to all registered nurses in all wards and covered a period of three years. The initial request stated no reason concerning why the union sought access to this sensitive information.

The Proficiency Reports are a means of evaluation of job performance and abilities of registered nurses employed at the Center. The report is prepared on a standard form, containing two pages. The first page contains various numerical ratings for factors such as integrity, emotional stability, and interpersonal relations. An overall numerical score is assigned, as well as a rating of the individual's capacity for advancement. The second page contains a narrative discussion of the individual's performance during the relevant period, areas of advancement, strengths and

weaknesses, and other similar matters. It is beyond doubt that the information in the proficiency reports is sensitive in nature, and release of this information, if identifying information were not adequately deleted, would result in embarrassment of the persons to which they pertain.

Mrs. Sanchez had previously sought, and obtained, release of proficiency reports pertaining to one or a few nurses at the Center in relation to specific grievances then pending, but each such release was obtained after she sought and obtained consent from the individual or individuals to which the reports pertained. In this instance she did not request consent from the nurses at the Center before making the request, and could not have obtained consent from plaintiffs, who vehemently objected to the release of their proficiency reports. Nor was the request made pursuant to any pending grievance. Mrs. Sanchez, acting alone, decided to review all proficiency reports to determine whether a grievance could or should be filed in relation to the manner in which the reports were prepared by management personnel. The reports were never used in relation to any grievance or other union-related activity subsequent to their release. Furthermore, the union membership had taken no official action to authorize Mrs. Sanchez to make such request or to file a grievance regarding the general issue of completion of the proficiency reports by Head Nurses.

Mrs. Sanchez' requests of June 5, 1984, was received by Ms. Hazel Gilligan, who is the Chief of Personnel Services at the center, and is the custodian of the personnel files. Ms. Gilligan had received some training concerning her duties under the Privacy Act, and was supplied with a Federal Personnel Manual which contains guidelines for responses to requests for information contained in personnel files. Ms. Gilligan had never before been presented with a blanket request for personnel files, and she never had been requested to disclose such information without the consent of the individual to which the file pertained. Therefore, she consulted the provisions of the Personnel Manual in response to the request by Mrs. Sanchez. She then wrote a letter to Mrs. Sanchez, dated June 5, 1984, stating that, before a determination could be made as to the Union's entitlement to such record, a reason for the request had to be given. By letter dated June 7, 1984, Mrs. Sanchez responded by stating generally that the reports would be used in a grievance which the Union was considering filing, and in preparing for a labor/management meeting scheduled to be held later in the month of June.

Ms. Gilligan also sought guidance from the defendants' national office in Washington, D.C., but only discussed the matter with the Labor Relations Department, and did not consult with the legal department. She was informed that she was required to release the proficiency reports under 5 U.S.C. § 7114(b), but that she should sanitize the

reports prior to their release so as to delete any identifying information. Ms. Gilligan had received no training regarding sanitizing personnel records, and received no assistance or guidance from the national office in this regard.

Between June 7, 1984 and June 19, 1984, Ms. Gilligan attempted to remove any identifying information from the approximately sixty reports to be released by making photocopies of the original reports and by using a black felt tip pen to black out any information which, in her judgment, might serve to identify the subject of the report. After completing this task she requested her assistant, Wanda Dykeman, to review the copies and delete any additional information which Dykeman felt might identify the subject of the report. However, Ms. Gilligan felt unqualified to detect all identifying information relating to the subjects of the reports, due to her lack of knowledge conncerning information such as classes attended or conducted, committee assignments or chairmanships, outside activities, and the like. She therefore requested Mrs. June Wright, the Head Nurse at the Medical Center, to review the reports and to delete any additional identifying information prior to their release. After receiving back the sanitized reports from Dykeman and Wright, Ms. Gilligan briefly reviewed them, made photocopies, and produced these to Mrs. Sanchez on June 19, 1984. Among those reports so provided were reports pertaining to the plaintiffs in this action.

Between June 14 and June 19, 1984, Ms. Gilligan received several written objections to the release of the reports from plaintiffs and other nurses employed at the Medical Center, all requesting that their reports not be released. In response to these requests Ms. Gilligan, by letter dated June 20, 1984, to all nurses employed at the Medical Center, stated that "Management is required to release these documents under the provisions of PL-95-454, Section 7114." Such letter reassured the nurses that all of the reports released had been completely sanitized by members of the personnel office, with the assistance of the Chief Nurse, and included as an attachment a proficiency report pertaining to Laura Scherr in its sanitized condition, intended to show that identification of the subject of the report was not possible as sanitized. However, the report pertaining to Laura Scherr was not adequately sanitized, and several of her co-workers were able to identify her, based upon the information contained in the released report.

The record establishes that third parties acquainted with the following plaintiffs could, and did, recognize their identity through the information released in their proficiency reports: B. J. Durham, Mary Fox, Maxine Griffin, Betty Grubb, Ruth Homes, Lucille Hope, Deloris O'Brien, Laura Russell, Laura Scherr, and Kathryan Toulouse. Indirect evidence adeqately establishes that the identity of the following plaintiffs could be determined through the information released in

their proficiency reports though no third party did in fact so identify them: Diane Ingle, Carolyn O'Brien, Ada Shader, and Victoria Smith. In each of these instances the testimony offered was that the subject of the report could identify herself through the information released, but no direct evidence or testimony was offered to show that any third party could or did identify them through such information. However, a review of the reports themselves, as well as the other evidence in the record is adequate to lead to a logical inference that persons acquainted with such plaintiffs, including their co-employees, could readily identify their reports based upon the information released. No evidence was submitted to show that the information in the proficiency reports of the following plaintiffs was such as would enable any third party to identify the subject of the report: Frances Cassle, Dorothy Homyak and Margaret Wickham. The testimony shows that each of the plaintiffs suffered some degrees of anguish, embarrassment, or other mental trauma as a result of the release of their proficiency reports, but none suffered any pecuniary loss. The evidence also indicates that the release has adversely effected the proficiency reporting system at the Medical Center as a means of performance evaluations due to fear that the information contained in the reports may later be disclosed to third persons. Also, the working environment at the Medical Center was adversely effected by the release, and tensions and antagonism are more prevalent there since the information was released.

Hazel Gilligan acted conscientiously, in good faith, though inadvertently negligently, in releasing the proficiency reports in an inadequately sanitized condition. Her superiors in Washington, in failing to provide her with adequate training or guidance in relation to release of information covered by the Privacy Act, and in instructing her that release of the proficiency reports was compelled by 5 U.S.C. § 7114 were grossly negligent. The evidence is adequate to establish a willful or intentional violation of the Privacy Act, as that term has been defined by relevant cases, by the Washington personnel of the defendant. Ms. Gilligan requested a reason for disclosure from Mrs. Sanchez solely for the purpose of having information in her file to justify the release. She felt that she could not second guess the Union in determining whether release to aid in a pending or proposed grievance proceeding would be proper. She viewed her obligations under the Privacy Act as being limited to assuring the materials were fully sanitized before the release in a context where the Union has requested access to them. She did not attempt to balance the privacy interests of the subjects of the reports against the competing interests of the Union in obtaining the records, which interests were ambiguous and virtually undefined, and she never concluded that the Union's interests were adequate to override the privacy interests of plaintiffs. She felt that whenever the Union asks for information in the personnel files of employees it represents, when it is acting in a representative capacity, it

should be given the records in a sanitized form. She determined that the Union was entitled to receive the information without having an adequate factual basis to determine whether the request was legitimate, or was necessary to the Union's attempts to represent the nurses at the Medical Center. She did not seek consents to the releases, and considered no alternatives to a blanket release of all reports requested, after attempts were made at sanitization. As a result the privacy interests of plaintiffs Durham, Fox, Griffin, Grubb, Holmes, Hoppe, Deloris O'Brien, Russell, Scherr, Toulouse, Ingle, Carolyn O'Brien, Shader and Smith were violated.

CONCLUSIONS OF LAW

The Court has jurisdiction over the subject matter of this action under 5 U.S.C. § 552a(g) and 28 U.S.C. § 1331, and venue is properly in the United States District Court for the District of Wyoming.

The Privacy Act of 1974, including 5 U.S.C. § 552a, provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the

> individual to whom the record pertains ... 5 U.S.C. § 552a(b).

The Act defines "system of records" to include:

> ... a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual. 5 U.S.C. § 552a(a)(5).

The personnel files relating to plaintiffs were "systems of records" covered by the Privacy Act of 1974, and the proficiency reports were records contained within the system of records. 5 U.S.C. § 552a(a)(4).

The Privacy Act was adopted to protect the individual privacy of persons. The Congressional policy underlying the Act was stated in part as follows:

> [T]o promote governmental respect for the privacy of citizens by requiring all departments and agencies of the executive branch and their employees to observe certain constitutional rules in the ... use, and disclosure of personal information about individuals ...

> [T]o prevent ... the wrongful disclosure and use, in some cases, of personal files held by Federal agencies ... [and]
>
> [T]o promote observance of valued principles of fairness and individual privacy by those who ... administer ... institutional and organizational data banks of government and society. Sen.Rep. No. 93-1183 (1974) U.S.Code Cong. & Admin. News 1974, p. 6916 as discussed in Davis, *Administrative Law Treatise*, § 5.43 (2nd ed. 1978).

The Privacy Act does not forbid disclosure of such records in every instance, but rather contains a series of exceptions from the general rule of non-disclosure. Two exceptions are relevant to the issues raised in this action: 5 U.S.C. § 552a(b)(2), which provides that disclosure is allowed if required under Section 552 of this title (The Freedom of Information Act), and 5 U.S.C. § 552a(b)(3) which permits disclosure for a routine use as defined under 5 U.S.C. § 552a(a)(7), and subject to compliance with requirements set forth in 5 U.S.C. § 552a(e)(4)(D).

The first exception, stated in 5 U.S.C. § 552a(b)(2), is designed to reconcile competing, and conflicting, policies of Congress embodied in the Freedom of Information Act, and the Privacy Act of 1974. 5 U.S.C. § 552(a) states that agencies must generally make available to the public information

contained in their files. Section 552(b) contains various exemptions from disclosure, and includes:

> (6) personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; ... Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

However, the Freedom of Information Act did not preclude release of such information, but instead gave the agency discretion to withhold personnel files if it chose to do so. *Pennzoil Co. v. Federal Power Commission*, 534 F.2d 627 (5th Cir. 1976); *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore*, 508 F.2d 945 (4th Cir. 1974). Disclosure by the agency of information exempt from mandatory disclosure under Section 552(b)(6) did not constitute a violation of the Freedom of Information Act. *Id.*

The effect of the Privacy Act was to preclude disclosure of some information exempt from mandatory disclosure under the Freedom of Information Act, except under specified circumstances, and thus to remove the agency's discretion to disclose such information when not compelled by the Freedom of Information Act. Davis, *Administrative Law Treatise, supra*, § 5.43 p. 439; *Local 2047, Am. Federation of Government*

Emp. v. Defense General Supply Center, 423 F.Supp. 481 (E.D.Va. 1976), *affirmed* 573 F.2d 184 (4th Cir. 1978); *DePlanche v. Califano*, 549 F.Supp. 685 (W.D.Mich. 1982); *Antonelli v. F.B.I.*, 536 F.Supp. 568 (N.D.Ill. 1982), *rev'd on other grounds* 721 F.2d 615 (7th Cir. 1983), *cert. denied* ____ U.S. _____, 104 S.Ct. 2399, 81 L.Ed.2d 355; *Florida Medical Ass'n, Inc. v. Dept. of Health, Education and Welfare*, 479 F.Supp. 1291 (M.D.Fla. 1979); *Lovell v. Alderete*, 630 F.2d 428 (5th Cir. 1980); *Brown v. Federal Bureau of Investigation*, 658 F.2d 71 (2nd Cir. 1981). The proper analysis under Section 552a(b)(2) utilizes the standards developed under the Freedom of Information Act in determining whether disclosure is mandatory, or whether the information is exempt under Section 552(b)(6). *Rose v. Department of Air Force*, 495 F.2d 261 (2nd Cir. 1974), *affirmed* 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976).

Although a document contains information the release of which would constitute a clearly unwarranted invasion of personal privacy, still the agency must attempt to segregate and release non-sensitive or purely factual portions of the document. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); *Rose v. Department of Air Force, supra; Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir. 1973), *cert. denied* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 *on remand* 383 F.Supp. 1049 (D.D.C. 1974); *Ethyl Corporation v. Environmental Protection Agency*, 478 F.2d 47 (4th Cir. 1973). If the exempt

materials are inextricably intertwined with the non-exempt materials, the entire document is exempt from mandatory disclosure under the Freedom of Information Act, and disclosure is precluded by the Privacy Act. *Neufeld v. Internal Revenue Service*, 646 F.2d 661 (D.D.C. 1981); *Mead Data Cent, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242 (D.D.Cir. 1977); *Long v. U.S. Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979), *cert. denied* 446 U.S. 917, 100 S.Ct. 1851, 64 L.Ed.2d 271 (1980); *Sealand Terminal Corp. V. N.L.R.B.*, 414 F.Supp. 1085 (S.D. Miss. 1976). The information in the numerical ratings pertaining to plaintiffs is sensitive, but deletion of any identifying information in this portion of the reports would be a simple procedure, and then disclosure would not violate any person's privacy interests. Where, as here, identification is possible based upon the informaition released, a violation of the subject's privacy interests occurs. The information in the narrative sections of the reports is such that identifying information would normally be so inextricably intertwined with other materials that segregation is not reasonably possible, and it should be expected that release of any meaningful part of this portion of the reports will enable identification of the subject, and will result in an invasion of the privacy interests of the subject in the context of a relatively small facility such as the Medical Center.

In determining whether a violation of personal privacy is clearly unwarranted, the agency, and the Court, must balance the interests of

the subject in personal privacy against the competing interests of the party requesting the information in having access to agency documents. *Rose v. Department of Air Force, supra; Campbell v. United States Civil Service Commission*, 539 F.2d 58 (10th Cir. 1976); *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir. 1979), *cert. denied* 444 U.S. 842, 100 S.Ct. 82, 62 L.Ed.2d 54; *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir. 1980). Each case must be determined based upon its own fact. *Cohen v. E.P.A.*, 575 F.Supp. 425 (D.D.C. 1983); *Schonberger v. Nat. Transp. Safety Bd.*, 508 F.Supp. 941 (D.D.C. 1981). Both the agency, and the Court *de novo*, must balance these interests. It is error for the agency to fail to engage in this sort of analysis before determining whether or not to release the information. *Disabled Officer's Ass'n v. Rumsfeld*, 428 F.Supp. 454 (D.D.C. 1977); *Sears, Roebuck Co. v. General Services Admin.*, 553 F.2d 1378 (D.C. Cir. 1977) *cert. denied* 434 U.S. 826, 98 S.Ct. 74, 54 L.Ed.2d 84; *People of the State of Ill. v. United States*, 668 F.2d 923 (7th Cir. 1981) *cert. denied* 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); *Judiciary Committee of General Assembly v. Freedom of Information Com'n*, 39 Conn.Sup. 176, 473 A.2d 1248 (1983). With a request for multiple documents the balancing must be made in relation to each document on an individual basis. *American Civil Liberties Union v. Brown*, 609 F.2d 277 (7th Cir. 1979), *on rehearing en banc* 619 F.2d 1170 (1980). The enactment of the Privacy Act did not alter this analysis, which still must be followed in determining whether any given document falls

within the exemption of Section 552(b)(6). *Sears, Roebuck Co. v. General Services Agency, supra.*

In balancing the competing interests, the Court must consider a variety of factors, including the following: (A) The type of record requested, and the type of information it contains; (B) Potential for harm in any subsequent, non-consensual disclosure; (C) Injury from disclosure to the relationship in which the record was generated; (D) Adequacy of safeguards to prevent unauthorized disclosure; (E) Degree of need for disclosure, including any express statutory mandate; and (F) Any articulated public policy, or other recognizable public interest affected by disclosure or nondisclosure of the information. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3rd Cir. 1980).

The records requested contain very sensitive information, and the violation of plaintiffs' privacy interests was substantial. The evidence shows that plaintiffs suffered embarrassment and anxiety as a result of subsequent non-consensual disclosures. Clearly, the safeguards utilized to prevent disclosure beyond disclosure to the Union were inadequate. Non-consensual disclosures to other persons were foreseeable at the time the information was released to the Union. The disclosure substantially harmed the relationship between subjects of reports and those conducting performance evaluations, and chilled

communications in a relationship in which candor and confidence are essential.

Although it is possible that the Union's need for this sort of information could be substantial under other circumstances, the record shows that its interest in disclosure in this case was minimal. Mrs. Sanchez was on a general fishing expedition, which may have been motivated by spite or anger resulting from her own failure to obtain a requested promotion. The information was not needed to process any pending grievances. It was never used by the Union in representing the interests of the nurses employed at the Medical Center. While public policy favors the collective bargaining process, this interest was not substantially forwarded by disclosure under the facts of this case, and it must be balanced against the Congress' policy of protecting the privacy interests of plaintiffs as embodied in the Privacy Act and its legislative history. The balance in this case falls clearly against disclosure. The release of the proficiency reports to Mrs. Sanchez, in those instances where there was inadequate sanitization, constituted a clearly unwarranted invasion of the privacy interests of the subjects. Disclosure was not compelled by the Freedom of Information Act, and therefore release of this information violated plaintiffs' rights under the Privacy Act.

Defendants' continued reliance upon the holding in *Clemins v. U.S. Dept. of Treasury, I.R.S.*, 457 F.Supp. 13 (D.D.C. 1977) is misplaced. The

Court in its Order on Motion to Dismiss or for Summary Judgment dated May 6, 1985 discussed in detail the holding in *Clemins*, and need not reiterate that analysis here. *Clemins* involved non-sensitive information relating to only a few successful candidates for promotions sought by a union in relation to a pending grievance on behalf of non-successful candidates, rather than a broad request for information relating to all of the employees in a specified category employed by the agency. The Court denied disclosure of similar information relating to unsuccessful candidates unless all identifying information could be deleted, and refused disclosure in one instance because the identity of the subject of the report was known. *Clemins* supports the plaintiffs' position that the proficiency reports in this case should not have been disclosed due to inadequate sanitization, and also indicates that the information could have been disclosed without violating the Privacy Act had the agency exercised greater care in sanitizing the reports, for example by deleting the narrative portions of the reports and replacing these with paraphrased summaries which omit any means of identifying the subject. The information in these proficiency reports was exempt from disclosure under Section 552(b)(6), and disclosure was not allowed by Section 552a(b)(2).

5 U.S.C. § 552a(a)(7) defines a "routine use" as "the use of such record for a purpose which is compatible with the purpose for which it is

collected." Section 552a(e)(4) provides, in part, that:

> Each agency that maintains a system of records shall--....
>
> (4) Subject to the provisions of paragraph (ii) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include ...
>
> (D) each routine use of the records contained in the system, including the category of users and the purpose of such use ....

In order to qualify as a routine use under the Privacy Act the agency is required to comply with the provisions mandating that such uses be published in the Federal Register. *Parks v. United States Internal Revenue Service*, 618 F.2d 677 (10th Cir. 1980); *Ryan v. Department of Justice*, 595 F.2d 954 (4th Cir. 1979); *Exner v. Federal Bureau of Investigation*, 612 F.2d 1202 (9th Cir. 1980); *Zeller v. United States*, 467 F.Supp. 487 (E.D.N.Y. 1979). In keeping with Congess' policies embodied in the Privacy Act and its legislative history, the agency should narrowly define routine uses, and permit disclosure only when justified by a substantial public interest. *Local 2047 Am. Federation of Government Emp. v. Defense General Supply Center,*

supra. Any regulations enacted under the Privacy Act must be consistent with its purposes, and inconsistent regulations are invalid, and will not justify release of covered information. *Id. Parks v. United States Internal Revenue Service, supra. Wisdom v. Dept. of Housing Urban Development,* 713 F.2d 422 (8th Cir. 1983), *cert. denied* _____ U.S. _____, 104 S.Ct. 1272, 79 L.Ed.2d 678; *DePlanche v. Califano, supra. Saunders v. Schweiker,* 508 F.Supp. 305 (W.D.N.Y. 1981); *Florida Medical Ass'n, Inc. v. Dept. of Health, Education and Welfare, supra.* In construing regulations, the Court should narrowly interpret routine uses pursuant to Congress' intent, and in order to preserve the validity of the regulations. *Stiles v. Atlanta Gas Light Co.,* 453 F.Supp. 798 (N.D.Ga. 1978). Furthermore, though a union represents the subject of the document, still it is not entitled to any information in the employee's files based upon that status alone, or based upon any provision contained in the collective bargaining agreement, since the terms of the regulations, and of the statute, control access to such records. *Am Federation Government Emp. v. Defense General Supply Center, supra.* Any release made in reliance upon a routine use, as defined in the applicable regulations, must be for reasons consistent with the reasons stated in the rule. *Exner v. Federal Bureau of Investigation, supra.; Alford v. Central Intelligence Agency,* 610 F.2d 348 (5th Cir. 1980) *cert. denied* 449 U.S. 854, *reh'g denied* 449 U.S. 1027. Furthermore, Section 552a(b)(3) *permits* disclosure of sensitive information, rather than compels it, and the court

should still balance the competing interests of the parties in determining whether the release was an abuse of discretion under the circumstances.

The American Federation of Government Employees, in its amicus brief, argues that the release in this action was for a routine use and relies upon regulations of the Office of Personnel Management published at 47 F.R. 16, 489 *et. seq.* (April 16, 1982). Such regulations govern maintenance and use of official personnel files of agencies of the United States, including "Records that are performance-related, including: appraisal forms and supporting documentation issued under OPM approved employee ... approval systems...." 47 F.R. 16, 490 column 2, paragraph k. The regulations go on to define routine uses, stating that: "These records and information in these records may be used: ... j. to disclose information to officials of laabor organizations recognized under 5 U.S.C. Chapter 71 *when relevant and necessary to their duties* of exclusive representation concerning personnel policies, practices, and matters affecting work conditions." 47 F.R. 16, 490-16, 491. (Emphasis added).

No testimony or evidence was submitted to establish that these particular records were kept under an OPM approved employee approval system, or otherwise fell within the parameters of the cited regulations. However, assuming these records are covered by the OPM regulations, still the union ignores the limiting language requiring

the union to establish the records are relevant and necessary to performance of its duties as the exclusive bargaining agent of the registered nurses employed at the Medical Center. In effect the union and the defendant argue this regulation eviscerates completely the protections of the Privacy Act to the extent the information is requested by the subject's bargaining agent. The language of the regulations, and the principles of law discussed above prevent such an interpretation of the regulation, and the agency's position is clearly erroneous. The union is not entitled to receive any and all information contained in the relevant personnel files in every instance. To justify its request, the union must, under the regulations, be prepared to make an initial showing that it has a specific need for the information, and that the information is germane to a specific pending or contemplated grievance or other union activity. No such showing or justification was made in this case, and the overbroad, general, and undefined request made by Mrs. Sanchez was inadequate to justify release under these regulations.

The danger of disclosure made pursuant to such an ill-defined request is apparent on the facts of this case. The information released was never used in any manner to assist plaintiffs, or the other nurses at the Center or to improve their working conditions. Rather plaintiffs' personal privacy was adversely affected, and no countervailing benefit was reaped by anyone. The limiting language in the regulations was designed to prevent this sort of

occurrence, and the damage done could have readily been avoided had the regulations been followed as written. The release of information in this case cannot be justified as being a routine use under Section 552a(b) (3) or OPM regulations. Therefore, the release to Mrs. Sanchez constituted a violation of plaintiffs' rights under the Privacy Act. Moreover, even if the disclosure could be justified as a routine use, still release on the facts of this case constituted an abuse of discretion by the defendant, since it failed to give adequate weight to, or even to consider, plaintffs' private interests.

In addition, Ms. Gilligan's belief that disclosure was required by 5 U.S.C. § 7114(b)(4) was erroneous. Such statute provides:

> The duty of the agency and an exclusive bargaining representative to negotiate in good faith under subsection (a) of this section shall include the obligation-- ....
>
> In the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request, and, *to the extent not prohibited by law,* data--
>
> (A) Which is normally maintained by the agency in the regular couse of businss; [and]

(B) Which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. (Emphasis added).

Disclosure was in fact prohibited by law. Disclosure was not mandated by this Section under the circumstances of this case.

The union also argues that this action should be dismissed because plaintiffs failed to join the union as a co-defendant, and an indispensible party to this action. Both the Freedom of Information Act and the Privacy Act govern the conduct of Federal agencies. Neither provides a right of action against any other person or entity. *Parks v. United States I.R.S. supra*, 618 F.2d at p. 684; *Bruce v. United States*, 621 F.2d 914 (8th Cir. 1980); *Brown-Bey v. United States*, 720 F.2d 467 (7th Cir. 1983); *Windsor v. The Tennessean*, 719 F.2d 155 (6th Cir. 1983), *rehearing denied* 726 F.2d 277 *cert. denied* _____ U.S. _____, 105 S.Ct. 105, 83 L.Ed. 2d 50. A union lacks standing to assert claims under either Act on behalf of its members. *Id.* Thus, this argument lacks merit. Had plaintiffs joined the union as a defendant in this action it would have been summarily dismissed, since no claim could be asserted against the union under either statute. Therefore, it was not an indispensible party to this action.

Plaintiffs cannot recover injunctive relief under the Privacy Act based upon the allegations asserted herein. *Parks v. United States I.R.S., supra,* 618 F.2d at p. 684; *Edison v. Department of the Army*, 672 F.2d 840 (11th Cir. 1982); *St. Michael's Convalescent Hospital v. State of Cal.*, 643 F.2d 1369 (9th Cir. 1981); *Cell Associates v. National Institutes of Health*, 579 F.2d 1155, 1158-60 (9th Cir. 1978). 5 U.S.C. § 552a(g) provides, in part:

> (1) Whenever any agency ....
>
> (d) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection ....
>
> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the Court determines that the agency acted in a manner which was intentional or willful, the United States [shall] be liable to the individual in an amount equal to the sum of--
>
> (A) actual damages sustained by the individual as a result of the refusal

or failure, *but in no case shall a person entitled to recovery receive less than the sum of $1,000*; and

(B) the costs of action together with reasonable attorney fees as determined by the Court. (Emphasis added).

Emotional trauma, though unaccompanied by pecuniary loss, is adequate to establish an "adverse effect" giving a plaintiff standing to sue under these provisions. *Parks v. United States I.R.S., supra,* 618 F.2d at pp. 682-83; *Albright v. United States,* 732 F.2d 181 (D.C. Cir. 1984); *Johnson v. Department of Treasury, I.R.S.,* 700 F.2d 971 (5th Cir. 1983); *Fitzpatrick v. Internal Revenue Service,* 665 F.2d 327 (11th Cir. 1982).

Although there is some authority stating that a plaintiff may not recover actual damages for such injury under the Privacy Act, plaintiffs herein seek only the minimum damages amount of $1,000.00, and have not attempted to substantiate any entitlement to a greater amount. That is much more than this Court thinks is warranted here, but Congress, not this Court, has set that amount. Therefore, the plaintiffs may recover this amount, even in the absence of pecuniary loss. *Parks v. United States I.R.S., supra; Johnson v. Department of Treasury, I.R.S., supra; Fitzpatrick v. Internal Revenue Service, supra.* Nor is proof of premeditation required for an intentional or willful

violation within the meaning of the Privacy Act. *Parks v. United States I.R.S., supra,* 618 F.2d at p. 683. *Chapman v. National Aeronautics and Space Administration.*, 736 F.2d 238 (5th Cir. 1984)); *Chocallo v. Bureau of Hearings and Appeals, SSA,* 548 F.Supp. 1349 (E.D.Pa. 1982) *affirmed without opinion* 716 F.2d 889 (3rd Cir. 1983), *cert. denied* _____ U.S. _____, 104 S.Ct. 426, 78 L.Ed.2d 360.

Plaintiffs Durham, Fox, Griffin, Grubb, Holmes, Hoppe, Deloris O'Brien, Russell, Scherr, Toulouse, Ingle, Carolyn O'Brien, Shader and Smith were each adversely affected due to defendant's violation of their rights under the Privacy Act, and are entitled to recover damages in the amount of $1,000.00 each, as well as their costs of action. Plaintiffs have substantially prevailed on the merits, and are entitled to recover a reasonable attorneys fee, which the Court finds to be $5,000.00. *Exner v. Federal Bureau of Investigation, supra.* Judgment will be entered in compliance with these Findings of Fact and Conclusions of Law.

APPENDIX B

Andrews v. Veterans Administration of the United States, No. 85-2351 (United States Court of Appeals, Tenth Circuit, January 28, 1988)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

GEORGIA ANDREWS, ERIN BRETT FRANCES E. CASSLE, B.J. DURHAM, MAUREEN ENGERT, MARY FOX, MAXINE GRIFFIN, BETTY GRUBB, RUTH HOLMES, LUCILLE HOPPE, DOROTHY HOMYAK, SHARON K. KAISER, CHANDRA K. LILLEMOEN, CAROLYN O'BRIEN, DELORIS O'BRIEN, MARY JANE PRYSOCK, LAURA RUSSELL, LAURA SCHERR, JOAN SCHICK, BRENDA SCHULZ, VICTORIA SMITH, KATHRYAN TOULOUSE, MARGARET WICKHAM, NORMAN WILDE, and all others similarly situated,	)	NO. 85-2351
Plaintiffs-Appellees,	)	
vs.	)	
VETERANS ADMINISTRATION, of the UNITED STATES OF AMERICA	)	
Defendant-Appellant,	)	
AMERICAN FEDERATION OF	)	

GOVERNMENT EMPLOYEES, AFL-CIO,)
)
)
Amicus Curiae.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D.C. No. C84-0459-B)

Don W. Riske, Attorney at Law, Cheyenne, Wyoming, for Plaintiffs-Appellees.

Peter R. Maier, Appellate Staff Civil Division, U.S. Department of Justice (Richard K. Willard, Assistant Attorney General, Richard Allen Stacey, United States Attorney, and Leonard Schaitman, Appellate Staff Civil Division, U.S. Department of Justice, with him on the briefs), Washington, D.C., for Defendant-Appellant.

William J. Stone, Assistant General Counsel, Mark D. Roth, General Counsel, American Federation of Government Employees, AFL-CIO, Washington, D.C., as Amicus Curiae.

Before MOORE, ANDERSON, and TACHA, Circuit Judges.

ANDERSON, Circuit Judge.

The Veterans Administration of the United States of America ("VA") appeals from a judgment of the United States District Court for the District of Wyoming finding that the VA's disclosure of certain personnel records violated the Privacy Act rights of plaintiffs, registered nurses employed at a VA Medical Center ("Medical Center") in Cheyenne, Wyoming. We reverse.

BACKGROUND

On June 4, 1984, Ms. Pat Sanchez, president of the union local which was the exclusive bargaining representative for nurses employed at the Medical Center, made a written request to Ms. Hazel Gilligan, the Chief of Personnel Service at the Medical Center, seeking copies of proficiency reports (essentially job performance evaluations) for all registered nurses at the Medical Center for the years 1982-84. The request acknowledged that such reports would have to be "sanitized" by deleting all information that might tend to identify the subjects of the reports prior to disclosure. Pursuant to a written inquiry from Ms. Gilligan, Ms. Sanchez stated that the proficiency reports were needed in connection

with a grievance the union would possibly file and to facilitate preparation for upcoming labor-management negotiations. Certain of the plaintiff nurses, upon learning of the request for the reports, asked both orally and in writing that the records not be released.

Ms. Gilligan sought the advise of VA personnel in Washington, D.C. in determining how to respond to the request.[1] The Labor Relations department of the VA advised her that the Federal Service Labor-Management Relations Act, 5 U.S.C. § 7101-7135, ("FSLRA") required disclosure of the reports, but that they should be sanitized prior to disclosure to preserve the anonymity of the subjects of the reports. Accordingly, Ms. Gilligan attempted to santitize the reports by deleting with a black felt-tip pen any information which she felt would identify the subjects of the reports.[2] She

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1 The district court, in its findings of fact, stated that "Ms. Gilligan had received some training concerning her duties under the Pricacy Act, and was supplied with a Federal Personnel Manual which contains guidelines for responses to requests for information contained in personnel files." Andrews v. Veterans Administration of the United States, 613 F.Supp. 1404, 1408 (D. Wyo. 1985). However, as the district court further found, Ms. Gilligan had never before received a "blanket request" such as was made in this case, nor had she ever received a request for disclosure "without the consent of the individual to which the file pertained." Id.

2 As the district court found, the proficiency reports are prepared on standard forms and include two parts. The first part "contains various numerical ratings for factors

then asked her assistant to further sanitize the reports. Finally, Ms. Gilligan asked the head nurse at the Medical Center to review the reports and make any other deletions she felt necessary to protect the identities of the nurses. On June 19, she released the sanitized reports to Ms. Sanchez. Ms. Sanchez and two other nurses reviewed the records but no other people obtained access to them.

On June 20, in response to requests from the nurses that the reports not be released, Ms. Gilligan sent a letter to all the nurses at the Medical Center stating that the FSLRA required release of the reports but that they had been sanitized. To demonstrate that the identities of the nurses had been adequately protected, Ms. Gilligan's letter included as an attachment a copy of the sanitized proficiency report relating to plaintiff Laura Scherr. As the district court found, the report regarding Ms. Sherr was inadequately sanitized and several co-workers could identify her as the subject of the report.

As it turned out, the reports released were never in fact used in connection with any grievance

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such as integrity, emotional stability, dependability, and interpersonal relations" and includes an "overall numerical score" as well as a "rating of the individual's capacity for advancement." Andrews, 613 F.Supp. at 1407. The second part contains a narrative description of the quality of the subject's work during the relevant period.

or other union activity.[3] The district court concluded that "Mrs. Sanchez was on a general fishing expedition, which may have been motivated by spite or anger resulting from her own failure to obtain a requested promotion." Andrews, 613 F.Supp. at 1412.

The plaintiffs, registered nurses employed at the Medical Center, brought this action, seeking to enjoin the VA and the Medical Center from releasing the personnel records of the plaintiffs and other similarly situated "in an unsanitized or improperly sanitized condition" and seeking damages for the release of the records which, they alleged, was an intentional and willful violation of the Privacy Act of 1974, 5 U.S.C. § 552a. They alleged that the disclosure of the reports resulted in "injury and damages including, but not limited to, mental distress and embarrassment" and they sought damages of $1,000 for each plaintiff as well as attorney's fees. During pretrial discovery, plaintiffs sought and obtained production under court seal of the records released to the union. When plaintiffs reviewed the records, ten of the plaintiffs were recognized by their co-plaintiffs from information contained in the reports and four

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3 Ms. Sanchez testified, however, that she intended to use the requested reports in connection with an already filed and pending grievance, although she did not in fact do so. R. Vol. II at 32. She also testified that she had discussed with other union members at a meeting in April the possibility of filing a "class grievance in regard to the proficiency reports." Id. at 37.

plaintiffs were able to identify their own reports, although no other plaintiffs could so identify them. Three plaintiffs were unable to identify their own reports, nor could any other plaintiff so identify them.

Pursuant to a stipulation of the parties, the Medical Center was dismissed as a party and the case was tried to the court. The court denied the VA's motion to dismiss or, in the alternative, for summary judgment. After a two day trial, the district court entered its findings of fact and conclusions of law. It found that the record established that third parties acquainted with ten of the plaintiffs[4] could and did recognize their identity from information released in the reports. The court found that

> "[i]ndirect evidence adequately establishes that the identity of the following plaintiffs could be determined through the information released in

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4 B.J. Durham, Mary Fox, Maxine Griffin, Betty Grubb, Ruth Holmes, Lucille Hoppe, Deloris O'Brien, Laura Russell, Laura Scherr and Kathryan Toulouse.

> their proficiency reports, though no third party did in fact so identify them: Diane Ingle, Carolyn O'Brien, Ada Shader, and Victoria Smith.... [A] review of the reports themselves, as well as the other evidence in the record is adequate to lead to a logical inference that persons acquainted with such plaintiffs, including their co-employees, could readily identify their reports based upon the information released."

Andrews, 613 F.Supp. at 1409. With regard to three plaintiffs, Frances Cassle, Dorothy Honyak, and Margaret Wickham, the district court concluded that "[n]o evidence was submitted to show that the information in the proviciency reports... was such as would enable any third party to identify the subject of the report." Id.[5]

The district court [held] that each plaintiff "suffered some degree of anguish, embarrassment, or other mental trauma" from the release of the reports, but that "none suffered any pecuniary loss." Id. Finally, the court found that the release of the reports adversely affected the Medical Center's entire proficiency reporting system "due to fear that the information contained in the reports may later be disclosed to third persons," and

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5 Plaintiffs do not appeal the dismissal of the claims of these three plaintiffs.

harmed the working environment at the Center, causing increased "tensions and antagonism." Id.

In assessing the culpability of the VA, the district court found that Ms. Gilligan "acted conscientiously, in good faith, though inadvertently negligently, in releasing the proficiency reports in an inadequately sanitized condition." She failed to balance the privacy interests of the nurses against the interests of the union in having the reports, "which interests were ambiguous and virtually undefined." Id. The court further held that the VA personnel in Washington were "grossly negligent" in failing to adequately train or guide Ms. Gilligan regarding the release of information subject to the Privacy Act and in directing her in this case that release was required by FSLRA. It found that the gross negligence of the Washington VA personnel was a willful or intentional violation of the Privacy Act.

In its conclusions of law, the district court held that where identification of the subjects of the report was possible, as here, "a violation of the subject's privacy interests occurs." It found that the numerical ratings portion of the reports contained sensitive information, but that such sensitive information could be deleted and the remainder disclosed without violation of a person's privacy interests. On the other hand, the narrative portions of the reports contained identifying information "so inextricably intertwined with other materials that segregation is not reasonably

possible," and that disclosure "of any meaningful part of this portion of the reports" would "result in an invasion of the privacy interests of the subject in the context of a relatively small facility such as the Medical Center." Id. at 1411.

Having concluded that the VA erred in failing to balance the interests of the various parties in this case prior to disclosure, the court then conducted its own balancing. It found the violation of the nurses' privacy interests was "substantial" and that the union's interest in obtaining the documents was "minimal."[6] It therefore concluded that the disclosure of inadequately sanitized reports to Ms. Sanchez "constituted a clearly unwarranted invasion of the privacy interests of the subjects" in violation of the Privacy Act.[7] The court denied

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6 The court concluded that the union's interests were minimal based on the fact that Ms. Sanchez "was on a general fishing expedition" when she requested the reports, and that the information was not needed in connection with any pending grievances and was "never used by the Union in representing the interests of the nurses employed at the Medical Center." Andrews, 613 F.Supp. at 1412.

7 The district court also rejected the VA's argument that disclosure of the reports was permitted under the Privacy Act as a "routine use" pursuant to 5 U.S.C. § 552a (a)(7). While the American Federation of Government Employees, AFL-CIO, as amicus curiae, argues vigorously that the district court decision on this point was wrong, the VA does not appeal the routine use issue and we therefore do not address it.

plaintiffs' request for injunctive relief but awarded them $1,000 per plaintiff, finding that emotional trauma, even without pecuniary loss, was sufficient to sustain such an award. Finally, the court awarded plaintiffs, as prevailing parties, attorneys' fees of $5,000.

The VA appeals, alleging that the plaintiffs failed to show that the VA committed a willful or intentional violation of the Privacy Act. It essentially argues that it was faced with the difficult task of reconciling the pro-disclosure mandates of FSLRA and the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") with the anti-disclosure mandate of the Privacy Act. While it concededly may have been negligent, the VA argues it did not act in an intentional or willful manner. The VA also challenges the district court with rgard to the four plaintiffs who were able to identify their own reports but whose identities remained concealed from their co-plaintiffs. For the reasons set forth below, we reverse.

DISCUSSION

A. Relevant Provisions of Privacy Act, FOIA and FSLRA.

Several provisions of the Privacy Act, FOIA and FSLRA are relevant to this appeal.

1. Privacy Act:

The Privacy Act, 5 U.S.C. § 552a was enacted "'to protect the privacy of individuals identified in information systems maintained by Federal agencies by preventing the 'misuse' of that information." Thomas v. United States Dep't of Energy, 719 F.2d 342, 345-46 (10th Cir. 1983) (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2, 88 Stat. 1896, reprinted in 1974 U.S. Code Cong. & Ad. News 2177-78 (congressional findings and statement of purpose)). It states in pertinent part:

> "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure would be--
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> . . .
>
> "(2) required under section 552 of this title [FOIA];"

5 U.S.C. § 552a (b)(2). Thus, in this case, without the consent of the nurses who were the subjects of the proficiency reports, the VA was prohibited from disclosing the reports unless disclosure was required by FOIA.

The Privacy Act further provides:

"(g)(1) Civil remedies--Whenever any agency

. . .

"(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency ...

. . .

"(4) In any suit brought under the provisions of subsection (g)(1)(C) or (d) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

"(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recover receive less than the sum of $1,000; and

"(B) the costs of the action together with reasonable attorney fees as determined by the court."

5 U.S.C. § 552a(g) (1) (emphasis added). Accordingly, if release of the reports was not required by FOIA and had an "adverse effect" upon the nurses, and if the VA's action amounted to an "intentional or willful" violation of the Privacy Act, the nurses are entitled to damages and attorneys' fees.

2. FOIA:

FOIA generally provides for public disclosure of information contained in agency files, with specified exceptions. "The primary thrust of the Freedom of Information Act is to 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" Wren v. Harris, 675 F.2d 1144, 1145 (10th Cir. 1982)(quoting Dept. of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (quoting Rose v. Dept. of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)). The FOIA exception relevant to this case provides as follows:

> "(b) This section does not apply to matters that are--
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> . . .
>
> "(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invation of personal privacy; ... Any reasonably segregable portion of a

> record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

5 U.S.C. § 552(b) (emphasis added). As the district court acknowledged, an agency must attempt to segregate sensitive from nonsensitive material, if a document contains both, and release the nonsensitive information. See 5 U.S.C. § 552(b); Dept. of the Air Force v. Rose, 425 U.S. 352 (1976). "If the exempt materials are inextricably intertwined with the non-exempt materials, the entire document is exempt from mandatory disclosure under the Freedom of Information Act." Andrews, 613 F.Supp. at 1411 (citations omitted).

In this case, if the disclosure of the personnel files at issue "would constitute a clearly unwarranted invasion of personal privacy" such files are not subject to mandatory disclosure under FOIA; as such, they are protected from disclosure under the Privacy Act.[8]

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8 It is well settled that, to determine whether files are protected from disclosure under FOIA exemption 6, the agency, and the court reviewing an agency decision, must "balance the individual's right to privacy against the public's right to information." Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980)(citing Dept. of the Air Force v. Rose, 425 U.S. 352, 372 (1976)); see also Reporters Comm. for Freedom of the Press v. United States Dept. of Justice, 816 F.2d 730, 731 (D.C. Cir. 1987); Cochran v. United States, 770 F.2d 949, 955 (11th Cir.. 1985); Heights Community Congress v. Veterans Admin., 732 F.2d 526, 528-30 (6th Cir.), cert.

3. FSLRA:

Finally, FSLRA sets forth the rights and obligations of federal employees vis-a-vis the government. 5 U.S.C. § 7114 provides in pertinent part:

> "(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--
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> . . .
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> "(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
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> . . .
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> "(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining;"

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denied, 469 U.S. 1034 (1984); Chamberlain v. Kurtz, 589 F.2d 827, 841-42 (5th Cir.), cert. denied, 444 U.S. 842 (1979).

5 U.S.C. § 7114(b)(4)(B). See generally Am. Fed'n. of Gov't. Employees, Local 1345 v. Fed. Labor Relations Auth., 793 F.2d 1360 (D.C. Cir. 1986).

It embodies important public policies concerning the collective bargaining process.[9] Of course, section 7114 only requires disclosure to the extent not prohibited by law. Although there is little case law on the subject, no party in this case contends that the Privacy Act operates as an absolute bar to disclosure of information to union representatives under FSLRA. All parties here impliedly concede that the FOIA exemption to the Privacy Act, removing Privacy Act protection if disclosure is required by FOIA, applies in this case. The dispute centers largely on the alleged failure of the VA to do the balancing required under FOIA.[10]

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9 As the District of Columbia Circuit has stated, "[i]t is well-settled that section 7114 creates a duty to provide information that would enable the Union to process a grievance or to determine whether or not to file a grievance." Am. Fed'n of Gov't. Employees, Local 1345 v. Fed. Labor Relations Auth., 793 F.2d 1360, 1364 (D.C. Cir. 1986) (footnote omitted); see also Am. Fed'n of Gov't. Employees, AFL-CIO v. Fed. Labor Relations Auth., 811 F.2d 769 (2d Cir. 1987). Furthermore, "even if the Union chooses not to pursue a particular grievance, the statute creates a duty for the Agency to provide information that is relevant to the Union's need to understand new policies or the application of old policies that may affect members of the bargaining unit." Am. Fed'n., 793 F.2d at 1364.

10 Because of our conclusion that no willful or intentional violation of the Act occurred, we need not, in this case, review the district court's balancing of the public and

Indeed, there are important policy reasons why the Privacy Act should not absolutely bar disclosure of relevant information to unions. See generally Local 2047, Am. Fed'n of Gov't Employees v. Defense Gen. Supply Center, 423 F.Supp. 481, 485 n.7 (E.D. Va. 1976), ("Disclosing relevant information to recognized unions may easily be seen to advance the nation's federal labor-management relations policy by providing the union with data necessary to pursue its representational duties.") aff'd. 573 F.2d 184 (4th Cir. 1978) (per curiam).

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privacy interests at issue. Nonetheless, we note our concern over whether the district court adequately considered the public interest in disclosure of personnel information to a union representative in the fact of a request such as the one in this case. At the time the request was made, the VA had no evident reason to doubt the legitimacy of the request and certainly there were substantial indications that the information requested was within the scope of that which employers must furnish to unions under FLSRA. See generally Am. Fed'n. of Gov't. Employees, Local 1345 v. Fed. Labor Relations Auth., 793 F.2d 1360 (D.C. Cir. 1986). In enacting the statutes at issue in this case, Congress cannot have intended to place agencies in the difficult position of having to "second guess" the motivations and intentions of an authorized union representative who requests information, in sanitized form, arguably of the type to which unions are entitled to pursue their representational functions.

We note findings by the district court which suggest that Ms. Sanchez was abusing her position of authority and misusing her rights under FSLRA for personal reasons. Such conduct, if proven, would be reprehensible and would presumably invite potentially severe consequences.

As the foregoing discussion of the relevant statutes indicates, if the reports in this case were "personnel ... files the disclosure of which would constitute a clearly unwarranted invation of personal privacy" under 5 U.S.C. § 552(a) of FOIA, the Privacy Act prohibited their disclosure absent the consent of the nurses. And if the Privacy Act thus prohibited disclosure in this case, they could not be disclosed to Ms. Sanchez pursuant to FSLRA.

B. Standard for Privacy Act Liability.

As previously indicated, even if the Privacy Act is violated, no punishment may be imposed unless the agency acted in a manner which was intentional or willful. In this case the district court equated "intentional or willful" with gross negligence. The district court founded the VA's gross negligence, and therefore its willful or intentional violation of the Privacy Act, on its failure to adquately train or guide Ms. Gilligan on the Privacy Act and in directing her that FSLRA mandated release in this case. We hold that the district court erred as a matter of law when it equated gross negligence with a willful or intentional violation of the Privacy Act.

In Parks v. United States Internal Revenue Serv., 618 F.2d 677 (10th Cir. 1980), a widely cited decision of this curcuit on the Privacy Act, this court attempted to elucidate the meaning of "willful or intentional." While noting that something more than negligence is required, the court rejected the

view that "premeditated malice" is required. It called it "noteworthy" that the Privacy Act's legislative history states:

> "In a suit for damages, the [compromise] amendment reflects a belief that a finding of willful, arbitrary or capricious action is too harsh a standard of proof for an individual to exercise the rights granted by this legislation. Thus the standard for recovery of damages was reduced to 'willful or intentional' action by an agency. On a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence."

Id. at 683 (citing Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, reprinted in 120 Cong. Rec. 40405, 40406 (1974)) (emphasis added).

Thus, the legislative history suggests that something more than gross negligence is required. Some courts have explicitly so stated. See Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir. 1987); Moskiewicz v. United States Dept. of Agriculture, 791 F.2d 561, 564 (7th Cir. 1986) ("Evidence of conduct which would meet a greater than gross negligence standard, focusing on evidence of reckless behavior and/or knowing violation of the

Act on the part of the accused, must be advanced..."); Hill v. Dept. of Air Force, 795 F.2d 1067, 1070 (D.C. Cir. 1986) (per curiam) (citing Parks); Doe v. Gen. Serv. Admin., 544 F.Supp. 530, 541 (D. Md. 1982); South v. FBI, 508 F.Supp., 1104, 1108 (D. Ill. 1981).

Other courts have suggested that gross negligence is sufficient, some of them citing Parks for that proposition. See, e.g., Albright v. United States, 732 F.2d 181, 189 (D.C. Cir. 1984) (citing Parks); Chapman v. Nat'l Aeronautics and Space Admin., 736 F.2d 238, 243 (5th Cir.) (per curiam) (equating gross negligence with willfulness), cert. denied, 469 U.S. 1038 (1984). However, some of these courts, as well as others, have grappled with further definitions of willful or intentional. See, e.g., Laningham v. United States Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (intentional or willful means "so 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful'") (quoting Wisdom v. Dept. of Hous. & Urban Dev., 713 F.2d 422, 425 (8th Cir. 1983), cert. denied, 465 U.S. 1021 (1984)); Albright, 732 F.2d at 189 (willful or intentional requirement met "by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act."); Moskiewicz, 791 F.2d at 564 (7th Cir. 1986) (acts meeting greater than gross negligence standard require evidence of "reckless behavior and/or knowing violations of the Act."); Chapman, 736 F.2d at 243 (5th Cir. 1984) (court looks for evidence of

"unlawful intent" or "ulterior motive"); Wisdom v. Dept. of Hous. & Urban Dev., 713 F.2d at 425 (8th Cir. 1983), cert. denied, 465 U.S. 1021 (1984) (willful or intentional means "patently egregious and unlawful").

We reiterate 'Parks' conclusion that premeditated malice is not required to establish a willful or intentional violation of the Privacy Act. Nonetheless, the term "willful or intentional" clearly requires conduct amounting to more than gross negligence. We are persuaded by the District of Columbia Circuit's definition of willful or intentional that contemplate action "so 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful,'" Laningham, 813 F.2d at 1242 (quoting Wisdom, 713 F.2d at 425 (8th Cir. 1983)), or conduct committed "without grounds for believing it to be lawful" or action "flagrantly disregarding others' rights under the Act," Albright, 732 F.2d at 189, and we adopt those definitions, and add the view expressed in Moskiewicz, 791 F.2d at 564 (7th Cir. 1986), that the conduct must amount to, at the very least, reckless behavior. Those, and similar definitions, describe conduct more extreme than gross negligence.

Applying that standard to this case, our review of the record convinces us that the VA's conduct falls far short of a "willful or intentional" violation of the Privacy Act. Indeed, we find that it

falls short of even the gross negligence standard applied by the district court to that conduct.

More specifically, given the interpretation of FSLRA in other cases, we would not view the advice that FSLRA required release of the reports in sanitized form as even grossly negligent in the circumstances of this case. Furthermore, we do not view the evidence as supporting the conclusion that the VA was grossly negligent in failing to provide Ms. Gilligan with training or guidance. As the district court specifically found, "Ms. Gilligan had received some training concerning her duties under the Privacy Act, and was supplied with the Federal Personnel Manual which contains guidelines for responses to requests for information contained in personnel files." Andrews, 613 F.Supp. 1408. While neither Ms. Gilligan nor the Washington personnel specifically went through a balancing process denominated as such to determine whether the public interest in disclosure of the files outweighed any privacy interests the nurses had in such files, Ms. Gilligan's efforts to sanitize the files, pursuant to directions from the Washington VA personnel, themselves indicate some attempt to reconcile the two competing interests. See Sullivan v. Veterans Admin., 617 F.Supp. 258, 262 (D.D.C. 1985) ("While the VA was not completely successful in deleting all the personally identifiable references to plaintiff, its attempt to do so demonstrates that agency's consideration of and concern for plaintiff's privacy interests.") While Ms. Gilligan testified that she had recieved no formal

training in sanitization of records, her efforts to sanitize the reports were substantial. We view the inadequacy of those sanitization efforts as indicative of negligence, at most, on the part of the VA, not the higher level of culpability necessary to establish liability under the Privacy Act.

For the foregoing reasons we REVERSE the decision of the district court finding the VA liable for a violation of the Privacy Act and awarding to plaintiffs damages and attorneys' fees.

APPENDIX C

5 U.S.C. §552a (Supp. IV 1986)

§552a. Records maintained on individuals

(a) Definitions

For the purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual tht is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employm,ent history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system or records maintained for statistical research or reporting purposes only and not used in whole or in part in making any

determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions and disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency whch maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning and carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an intrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House or Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; and

(12) to a consumer reporting agency in accordance with section 3711(f) of title 31.

(c) Accounting of certain disclosures

Each agency, with respect to each system of records under its control shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragrpah (1) of this subsection for at least five years or the life of the records, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at this request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records

Each agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the

agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested,

to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements

Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects of him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by state or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under

compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance; .

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall--

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under

subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunties of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters underthe provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section,

the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurrd in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians

For the purposes of this section, the parent of any minor, or the legal guardian of any individual

who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties

Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice of requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2),

and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligency Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled fo rthe purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why

the system of records is to be exempted from a provision of this section.

(k) Specific exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shal be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United

States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required

under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival records

(1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rule established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(f) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists

An individual's name and address may not be sold or rented by an agency unless such action is

specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Report on new systems

Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect on such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) Annual report

The President shall annual submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding year;

(2) describing the exercise of individual rights of access and amendment under this section during such year;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(q) Effect of other laws

(1) No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(As amended Pub. L. 98-477, §2(c), Oct. 15, 1984, 98 Stat. 2211; Pub. L. 98-497, title I, §107(g), Oct. 19, 1984, 98 Stat. 2292.)

APPENDIX D

5 U.S.C. §7114 (Supp. IV 1986)

§7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representive is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition or employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

(Added Pub. L. 95-454, title VII, §701, Oct. 13, 1978, 92 Stat. 1202.)

APPENDIX E

5 U.S.C. §552 (Supp. IV 1986)

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a unformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner by required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent clear unwarranted invasion of personal privacy, an agency may delete identifying details when its makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully

in writing. Each agency shall also maintain and make available for public inspection and copying curring indexes providing indentifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction thta affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency on if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shal provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard chargeds for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the

information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding nay portions exempt from disclosre under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fee chargeable under a statute

specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo; *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98-620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the office or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for

public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the peson making such request setting for the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances"

means, but only to the extent reasonably necessary to the proper processing of the particular request--

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consulation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall

set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the interal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would

deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life of physical safety of any individual;

(8) contained in or related to examination operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collecte by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report or or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(As amended Pub. L. 98-620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. 99-570, title I, §§1802, 1803, Oct. 27, 1986, 100 Stat. 3207-48, 3207-49.)

(8)

No. 87-1769

In the Supreme Court of the United States

OCTOBER TERM, 1988

GEORGIA ANDREWS, ET AL., PETITIONERS

v.

THE VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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8 pp.

TABLE OF AUTHORITIES

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Petitioners contend that the court of appeals erred in concluding that gross negligence does not constitute intentional or willful conduct under the Privacy Act of 1974, 5 U.S.C. (& Supp. IV) 552a.

1. Petitioners are registered nurses employed at a Veterans Administration (VA) Medical Center in Cheyenne, Wyoming. In 1984, in response to a written request by the president of the union local that served as the exclusive bargaining representative of nurses at the Medical Center, the VA provided the union with copies of proficiency reports for petitioners and other nurses. The union claimed that the reports were needed "in connection with a grievance the union would possibly file and to facilitate preparation for upcoming labor-management negotiations" (Pet. App. B3-B4). Although the agency attempted to delete all information from the reports that might tend to identify the subjects, petitioners and others claimed that their identities had not been adequately pro-

tected. They brought this action against the VA and the Medical Center alleging that disclosure of their personnel records violated the Privacy Act of 1974 (Privacy Act), 5 U.S.C. (& Supp. IV) 552a. They sought injunctive relief to prevent any future disclosures, damages of $1,000 per nurse to compensate them for mental distress and embarrassment, and attorney's fees (Pet. App. B6).

Pursuant to stipulation, the Medical Center was dismissed as a party, and the case was tried to the district court (Pet. App. B7). After a two-day trial, the district court concluded (*id.* at A7-A8) that the identities of 14 of the nurses could be determined from the contents of the redacted reports and that each had suffered some degree of anguish, embarrassment or other mental trauma from the release of the reports. The district court found (*id.* at A9) that the VA employee at the Medical Center who released the reports on the advice of VA personnel in Washington "acted conscientiously, in good faith, though inadvertently negligently, in releasing the proficiency reports in an inadequately sanitized condition." The court further held (*ibid.*) that VA personnel in Washington were "grossly negligent" in failing to train or guide this employee adequately regarding the release of records subject to the Privacy Act and in directing her that release was required by the Federal Service Labor-Management Relations Act (FSLRA), 5 U.S.C. (& Supp. IV) 7101-7135.

The district court concluded (Pet. App. A9) that gross negligence was sufficient to establish a willful or intentional violation of the Privacy Act, as is required for liability under 5 U.S.C. 522a(g)(1)(D)(4). The district court denied petitioners' request for injunctive relief (Pet. App. A26) but awarded $1,000 to each petitioner who could be identified as the subject of a report (Pet. App. A27). The court also awarded petitioners $5,000 in attorney's fees as prevailing parties (Pet. App. A28).

2. The court of appeals reversed, holding that the district court erred as a matter of law when it equated gross negligence by the VA with the intentional or willful conduct required for damages liability under the Privacy Act. The court of appeals concluded (Pet. App. B22) that "the term 'willful or intentional' clearly requires conduct amounting to more than gross negligence." The court, adopting definitions from a number of other circuits, held (*ibid.* (internal quotation marks and citations omitted)) that under the Privacy Act, intentional or willful conduct must be conduct "so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful," or "conduct committed without grounds for believing it to be lawful," or "action flagrantly disregarding others' rights under the Act" or conduct that amounts to, "at the very least, reckless behavior."

After reviewing the record, the court of appeals concluded (Pet. App. B22) that "the VA's conduct falls far short of a 'willful or intentional' violation of the Privacy Act." "Indeed," the court stressed (*id.* at B22-B23), "we find that it falls short of even the gross negligence standard applied by the district court to that conduct." The court noted (*id.* at B23) that the VA was required to strike a balance between the union's interest in disclosure, as reflected in the FSLRA, 5 U.S.C. 7114(b)(4)(B), and in the Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, on the one hand, and the privacy rights of the nurses, on the other. The court stated (Pet. App. B23) that the VA's unsuccessful efforts to sanitize the records "indicate[s] some attempt to reconcile the two competing interests." "We view the inadequacy of those sanitation efforts," the court concluded (*id.* at B24), "as indicative of negligence, at most, on the part of the VA, not the higher level of culpability necessary to establish liability under the Privacy Act."

3. Section 552a(g)(1)(D)(4) provides for damages liability on the part of the United States for a violation of the Privacy Act only if the agency in question "acted in a manner which was intentional or willful." Petitioners do not contend that the VA intentionally violated the Privacy Act. And, in cases dealing with other statutes, this Court has consistently interpreted the term "willful" to require either an intentional violation of a known legal duty or "reckless disregard for the matter of whether * * * conduct was prohibited by the statute." *McLaughlin* v. *Richland Shoe Co.*, No. 86-1520 (May 16, 1988), slip op. 5-6. See also *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-130 (1985); *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976); *United States* v. *Bishop*, 412 U.S. 346, 360 (1973); *United States* v. *Murdock*, 290 U.S. 389, 394 (1933). It is not parsing too finely to say that "reckless disregard" for whether conduct is prohibited by the statute is a more stringent standard of proof than negligence, however gross. *Bishop*, 412 U.S. at 361.

This reading of the Privacy Act is also borne out by its legislative history. Congress explained the term "intentional or willful" as used in the Privacy Act as follows:

> In a suit for damages, the [compromise] amendment reflects a belief that a finding of willful, arbitrary, or capricious action is too harsh a standard of proof for an individual to exercise the rights granted by this legislation. Thus, the standard for recovery of damages was reduced to "willful or intentional" action by an agency. On a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence.

Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, reprinted in 120 Cong. Rec.

40406 (1974) (Pet. App. B20). Petitioners (Pet. 9) read this explanation as evidence that Congress equated willful or intentional action with gross negligence. But the plain words that Congress used in explanation of the phrase demonstrate that gross negligence is not the equivalent of intentional and willful conduct under the Privacy Act; rather, the standard is "somewhat greater than gross negligence."

4. Petitioners further contend (Pet. 10-14) that the decision below conflicts with decisions of the Fifth and D.C. Circuits. But although both those courts have suggested in passing that the "intentional or willful" standard resembles gross negligence, neither has expressly held that gross negligence alone satisfies that standard. In *Chapman* v. *National Aeronautics and Space Admin.*, 736 F.2d 238, 243 (5th Cir. 1984) (per curiam), the court suggested that an "unlawful intent" or "ulterior motive" may be necessary to show that an agency violated the statute in an intentional or willful manner. And the D.C. Circuit has held that willful or intentional conduct under the Privacy Act encompasses action that is "so 'patently egregious and unlawful' that anyone undertaking the conduct should have known it 'unlawful,' " *Laningham* v. *United States Navy*, 813 F.2d 1236, 1242 (1987) (citations omitted), or conduct that is committed "without grounds for believing it to be lawful" or action "flagrantly disregarding others' rights under the Act." *Albright* v. *United States*, 732 F.2d 181, 189 (1984).

Far from parting company with these cases, the court below expressly relied upon them (see Pet. App. B21-B22) in formulating the standard it applied in this case. Furthermore, the decision below is also consistent with the holdings of the remaining courts of appeals that have addressed this question. See *Moskiewicz* v. *United States Dep't of Agriculture*, 791 F.2d 561, 564 (7th Cir. 1986);

Wisdom v. *Department of Housing and Urban Development,* 713 F.2d 422, 425 (8th Cir. 1983), cert. denied, 465 U.S. 1021 (1984). In any event, petitioners simply ignore the fact that the court of appeals held (Pet. App. B22-B23) that they were not entitled to prevail even if gross negligence could satisfy the intentional or willful standard. Accordingly, the judgment below would have been the same even if petitioners' standard had been adopted.

The court of appeals properly noted (Pet. App. B23) that the VA attempted to strike a balance between the interest of the union in disclosure and the interest of petitioners in preserving their privacy. Even if the VA struck the wrong balance, and negligently redacted the documents it disclosed, that negligence did not rise to the level of culpability necessary to establish a "willful or intentional" violation of the Privacy Act.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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